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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

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REPLY BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

ARGUMENT

I. THE MUST-CARRY LAW IS SUBJECT TO STRICT-SCRUTINY REVIEW

According to the appellees, all legislated restrictions on speech or press, whether they target the constitutionally protected activity to purposefully burden the exercise of the guaranteed freedom, or whether they are laws of general applicability impacting on those uniquely guarded liberties only incidentally, are conveniently lumped together for judicial review under a single standard.[1] Content-related regulations nar-

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[1] Appellees, following the lead of the court below (J.S. App. 9a, 19a, 22a-23a), make a limited exception for those intrusions that dictate either the viewpoint or the subject-matter

rowly aimed at communicative activity and which, *on their face*, override the First Amendment's command, are said by appellees to be no different (for purposes of judicial evaluation) from those laws that are facially free of constitutional implication.[2] *Associated Press v. United States*, 326 U.S. 1 (1945), a vintage case in which a First Amendment immunity was raised in defense to application of the generally applicable antitrust laws, is, in appellees' universal view, the guiding precedent for *ad hoc* incursions by the Congress on select portions of the mass-media press, including content-based controls on fully protected communications lawfully published over the targeted medium. *E.g.*, Brief For Federal Appellees at 17 ("The proper framework for evaluating the First Amendment issues in this case is found in *Associated Press v. United States* . . .").[3]

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of the particular message. All other *ad hoc* burdens on speech or press, they say, are subject to examination under the "relatively lenient standard" of *United States v. O'Brien*, 391 U.S. 367 (1968), as "refined" by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *See, e.g.*, Briefs of NAB at 20-21, Federal Appellees at 11, 40-41. Indeed, the Government believes that *O'Brien* "applie[s] too demanding a standard", Brief for Federal Appellees at 13, and that an even "less demanding standard" should pertain. *Id.*

[2] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993) (laws *selectively* burdening the exercise of freedoms guaranteed by the First Amendment "must undergo the most rigorous of scrutiny"); *see also id.* at 2226-27, 2232. Here, the Government insists that the constitutional guarantee survives, largely at the leave of the Congress, and may be withdrawn, provided only that there is demonstrated, *on balance*, good cause for the retraction.

[3] See also, the Brief for the Federal Appellees at 17, quoting the familiar passage from *Associated Press*, 326 U.S. at

Appellees steadfastly avoid treatment of the constraint by which the First Amendment limits the lawmaking powers of the Congress. Instead, they summarily *conclude* that the constitutional command, "make no law", is facilely overcome through a simple self-help mechanism—an in-house rhetorical exercise. The Solicitor General advocates that once a majority of the Congress identifies problem areas and sufficiently tars the targeted activity as, for example, "market dysfunction" or in need of supervision (Brief For Federal Appellees at 25), the label, alone, not only relaxes the constraint by which the First Amendment bars selective legislative intrusion, but also shifts the burden to the targeted speaker to show why he or she should be permitted to exercise the "previously" guaranteed, but now suspended, freedom. According to the Government, content-related burdens purposefully placed on the press, provided they are accompanied with plausible legislative "findings",

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20, "the First Amendment * * * rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." No party to this appeal takes exception to that incontrovertible principle. Daniels strongly excepts, however, to citation of *Associated Press* for the proposition that Congress may selectively legislate content-based restraints on one component of the press at the prodding, and for the special benefit, of another faction of the media. When politicians curry favor with one part of the press by legislatively suppressing the speech-related freedoms of other competitive speakers and media, the intrusion openly mocks the principle of a free, independent press. Instead of furthering a "diverse and antagonistic" communications media and, thereby, a "free press" and a "free society", *id.*, the must-carry law militates toward a press—certainly the electronic model—that is beholden to, or at the mercy of, the political establishment.

need be examined *only* to determine whether, *on balance*, the enactment outweighs the speaker's First Amendment interests.[4] Suddenly, and without discussion, it is the putative speaker that must persuade the reviewing judge of its right *lawfully* to communicate, a freedom once thought to be *foreclosed* to *ad hoc* limitation by the legislature (except under the most compelling or extraordinary conditions).[5]

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), constitutional adjudication has focused primarily on the Constitution itself. *Id.* at 180.[6] Appellees contend, however, that by this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the body of constitutional law has abruptly been reshaped to redirect that focus away from the Constitution and, instead, to those reasons given by the legis-

[4] The Court below declined even to question the relevant "findings" of the Congress (J.S. App. 15a), holding that "courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." *Id.* In such manner, the legislative branch, the Constitution and the balance-of-powers doctrine notwithstanding, is made a unilateral force enabled, largely at its own discretion, to respect, or to infringe upon, the individual's First Amendment freedoms.

[5] It is reiterated that no appellee advocates here a strict-scrutiny test. Instead, and as they must, appellees argue that *selective, content-based* intrusions on the press, resulting from *ad hoc political* action, may be justified under the First Amendment, provided only that there is, *on balance*, good reason for the offending restraint. This, we submit, "is to trivialize constitutional adjudication". *Houchins v. KOED, Inc.*, 438 U.S. 1, 13 (1978).

[6] *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget that it is a constitution we are expounding").

lature for its *deliberate variance* from that once "superior paramount" instrument. *Marbury*, 5 U.S. (1 Cranch) at 176. Whereas, prior to *Ward*, the United States was a "government of laws", *Marbury*, 5 U.S. (1 Cranch) at 163, where the very highest order was a "written constitution", the "modern" version of government, advanced here by appellees, is one of "men", *id.*, where the principal duty of judges is no longer to interpret constitutional provisions, but rather to balance the competing interests to determine whether it is the guaranteed freedom or its abridgement that is the more substantial.[7] When the free exercise of First Amendment liberties is consciously geared to a substantiality test, as appellees unanimously urge, the standard is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices . . . masquerading as judgments whether [the] legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough". *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J. dissenting).[8]

Under appellees' theory of the First Amendment, the role of Article III courts, specifically when reviewing Article I enactments that *facially* exceed the legislative body's constitutionally limited powers, is that of a super-legislature, either to ratify the political will of elected representatives or to repeal those majority views.[9] A theme common to each of

[7] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) at 177 ("an act of the legislature, repugnant to the constitution, is void").

[8] Daniels notes that *Craig* involved "equal protection" claims under the Fifth Amendment where a lesser constitutional scrutiny is in order.

[9] In either case, appellees would make it the subjective discretion of the reviewing jurist, and not the Constitution, that is decisive to the adjudication.

appellees' briefs is that courts, much in the style of legislative bodies, provide a forum where it is the popularity of, or public advisability for, the purposeful abridgement of the specially protected liberty, rather than its constitutionality, that is central to the adjudication. Under appellees' concept of American government, the Constitution is a secondary instrument, subordinate to the discretion of legislators, provided only that reviewing judges, applying their "super" discretion, concur in the *prudence* of the particular legislative excess before them. That concept not only guts the First Amendment, it rejects the most fundamental principle of constitutionally limited government. Note 7, *supra*.

In appellees' view, the peoples' prerogative to communicate free of *ad hoc* interferences by government, except in a few limited instances (*i.e.*, where the message itself is mandated), is little more than a factor of sorting out the respective interests of the rival principals—the "right" of the targeted individual balanced against society's interest in suppressing that right.[10] Appellees would have judges subjectively decide on a case-by-case basis which interest, society's or the individual's, is the more substantial. Any

[10] Daniels, of course, acknowledges that there are circumstances, exceptional though they be, where a compelling interest of society as a whole may lawfully mitigate freedoms constitutionally guaranteed to the individual. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 512-13 (1991) (Kennedy, J., concurring). No one here has claimed the must-carry law to present such a case. Indeed, the *one* contention common to the briefs of all appellees and their supporting *amici* is that the content-based restraint purposefully placed on the cable operators' freedom of speech and of the press is subject to review under something considerably less than a strict-scrutiny standard.

thought that the First Amendment establishes special preserves where the selective mischief of legislators and, particularly, the *ad hoc* will of political majorities, are "foreclosed", once the cornerstone of First Amendment jurisprudence, is altogether abandoned.[11] Appellees attribute this asserted flip-flop in constitutional law to this Court's action in *Ward*. Daniels respectfully suggests that appellees overreach. *See* Daniels' opening brief at 31-33.

II. THE MUST-CARRY LAW IS INCOMPATIBLE WITH THE SCARCITY DOCTRINE

A sub-tact taken here by the Government is to urge, again without meaningful discussion, that this case involves nothing more than the licensing of radio frequencies under the "public interest" standard of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713, and, accordingly, should be governed under the Scarcity Doctrine as evolved through a series of broadcast-licensing cases commencing with *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). *See* Brief for Federal Appellees at 13 ("the court [below] should have applied the less demanding standard of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)"). While other appellants here treat this argument more thoroughly, Daniels will show that *Red Lion* not only fails to support the

[11] *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). *See also* Potter Stewart, *Or of the Press*, 26 Hastings L.J., 631, 633 (1975) ("the Free Press guarantee is, in essence, a *structural* provision of the Constitution"). When the various factions of the communications media must constantly importune the Congress, either for *ad hoc* favors or to mitigate previously imposed burdens, the result is anything but a free or independent press. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

must-carry law, the decision in that case, if it is at all apposite, is squarely at odds with the Government's position.

Underlying the Court's *Red Lion* opinion is the principle that a license to broadcast confers a special "privilege", 395 U.S. at 394, in return for which the uniquely favored licensee concedes a modest amount of its First Amendment freedom. *Id.* at 396-98. Thus, under *National Broadcasting Co., Red Lion*, and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), any permissible inroad on traditionally recognized "speech" and "press" freedoms is a necessary trade-off where the specially privileged licenses makes limited concessions for its use of the valuable, physically scarce radio frequency.[12]

In the case of the must-carry law, it is the proponent/beneficiary of the special-interests legislation, the already privileged broadcast licensee, that is still further, and quite uniquely, privileged. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451, 1452-53 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("Under [must-carry], local broadcasters are guaranteed the right to convey their messages . . . while cable programmers must vie for a proportionately diminished number of channels . . . . [M]ust-carry rules transfer control [of a cable system] to local broad-

[12] Even under the Scarcity Doctrine—that most permissive (and also most limited) of First Amendment standards—this Court has made clear that while the "licensee is . . . held accountable for the totality of its performance", it retains its day-to-day "journalistic independence", *Columbia Broadcasting Sys.*, 412 U.S. at 121, and that because "editors—newspaper or broadcast—can and do abuse [their editorial] power . . . is no reason to deny the discretion. . . ." *Id.* at 124.

casters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether").

The scheme of the must-carry law is *doublely* to advantage the already privileged licensee, and to do so by affirmatively restraining the speech liberties of those "lesser" persons *not* endowed with the valuable, scarce broadcasting license.[13] Under this special-interests regime, the very imbalance that the Scarcity Doctrine is calculated to mitigate is compounded; and, indeed, the gap between those limited few licensed to speak via the public airwaves and all other persons is substantially widened. Instead of moving in the direction of a greater parity between the specially privileged broadcast speaker and all other speakers, the must-carry law promotes an even greater disparity. The must-carry law classifies equally protected persons and fosters, as a matter of official policy, a speaker-elite; and that, alone, is "wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).[14]

[13] *Cf. Red Lion Broadcasting Co.*, 395 U.S. at 389 ("as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused").

[14] *See also Columbia Broadcasting Sys.*, 412 U.S. at 127 n.21 ("We see no principal means under the First Amendment of favoring access by organized political parties over other groups and individuals"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (where governmental classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution", the test is one of "strict judicial scrutiny"). The must-carry law, *on its face*, "impinges" upon the "fundamental right" of cable operators and cable programmers to communicate free of governmental intrusion, a liberty "explicitly . . . protected by the Constitution". *Id.*

CONCLUSION

The judgment of the court below should be reversed and the Court should declare the must-carry provisions of the 1992 Cable Act unconstitutional on their face.

Respectfully submitted,

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